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No. 86-29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT H. ALLPHIN and GEORGE T. RUMMEL,

Petitioners,

vs.

WILLIAM J. BENSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the right of public employees to be free from retaliation for their exercise of First Amendment rights was clearly established in 1976, thereby negating the Defendant's qualified immunity defense raised during and after trial especially since that defense had been rejected by the district court on three prior occasions.

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STATEMENT OF THE CASE

The respondent WILLIAM J. BENSON (Benson), a former State Employee, alleged in this section 1983 action (1) that, the defendant State officials of the ILLINOIS DEPARTMENT OF REVENUE (DOR) retaliated and harassed him and on June 24, 1976, discharged him in violation of his First Amendment rights and (2) that, after his discharge, the Defendants conspired to and did harass him in violation of his First Amendment rights.

The original complaint in this case was filed on October 6, 1977 (R.1).[1] The district court's jurisdiction was invoked pursuant to 28 U.S.C. §1331 and §1343. The case proceeded to trial on Benson's Amended and Supplemental Complaint (R.77) on October 12, 1983. On October 31st, 1983, the jury returned verdicts in favor of Benson and against ROBERT H. ALLPHIN (Allphin) on both counts. They awarded Benson a total of $353,000.00 in damages (R.229A). A Rule 58 judgment was entered on those amounts.

The trial court entered a directed verdict at the close of Plaintiff's case in favor of GEORGE RUMMEL (Rummel) on the basis that Benson had failed to link Rummel to the alleged conspiracy (A.23).[2] It rejected however, the qualified immunity defense (R.217). On June 14, 1984, the court granted judgment notwithstanding the verdict to Allphin on the basis of the Eleventh Amendment and qualified immunity (C.2-3).

The Seventh Circuit reversed the directed verdict in favor of Rummel (A.23-24) and reversed in part the judgment in favor of Allphin. It then found that Allphin and Rummel were entitled to qualified immunity with respect to pre-termination harassment and the termination itself (A.22); it found that the petitioners were not entitled to qualified immunity with respect to the post termination harassment claims (A.22).

Benson has filed a Petition for Certiorari in this Court challenging the Seventh Circuit's findings with respect to

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[1] R. represents the record on appeal; the number refers to each specific item. T. refers to the trial transcript.

[2] A. refers to Appendix A of the Petition for Certiorari; B. Refers to Appendix B; C. refers to Appendix C.

the pre-termination claims (See No. 86-27, docketed in this Court on July 10, 1986). The Seventh Circuit's conclusion with respect to the post termination harassment is now before this Court on the instant petition.

Benson adopts, as his Statement of the Case, the statement contained in the opinion of the Seventh Circuit, which appears at A.2 through A.8 of the Petition, as supplemented by the Statement contained in Benson's Petition (No. 86-27) at 4-12.

It must be noted, that Allphin and Rummel had moved for summary judgment on the basis of qualified immunity three times prior to trial and once during the trial. The confidentiality statute and the release of confidential information were not mentioned in any of those motions. The district court rejected the asserted qualified immunity defense on July 16, 1982 (R.138), on April 5, 1983 (R.167), and continued the last motion until trial. At trial, the Defendant's qualified immunity defense was rejected for the third time (R.217).

Rummel never raised the confidentiality statute as a defense in the district court. Allphin raised it for the first time in his brief in support of post trial motions (R.239). His assertion of that defense was in direct conflict with the affidavits he had filed in support of one of the earlier motions for summary judgment. There, he had stated under oath that he did not know of and thus could not have been motivated by Benson's disclosures to the press and various law enforcement officials. See *Benson v. Allphin*, 544 F.Supp. 464 (N.D. Ill. 182) at 470. It was also in direct conflict with the trial testimony of Allphin, Rummel and each of their witnesses.

ARGUMENT

The issue in this Petition, when refined to its essence, does not warrant review on certiorari. The right of employees to be free from retaliation for their exercise of First Amendment rights has been clear at least since *Pickering v. Board of Education*, 391 U.S. 563 (1968). The First Amendment violations which Benson asserts occurred in 1975 and continued through 1981 and after.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) this Court held that whether an official may prevail in his or her qualified immunity defense depends upon the "objective reasonableness" of his or her conduct as measured by reference to clearly established law. In *Davis v. Scherer*, 104 S.Ct. 3012 (1984) this Court again emphasized that "no other circumstances are relevant to the issue of qualified immunity" *id.*, at 3016.

In a related case, *Benson v. Scott*, 734 F.2d 1181 (C.A. 7, 1984), *cert. denied*, 105 S.Ct. 435 the Seventh Circuit in applying this doctrine, stated:

> In determining whether the actions alleged by Benson violate clearly established law, however, the relevant legal framework is not the Illinois Indemnification Act, as the Defendants and the district court believed. Benson's claim is that the Attorney General violated his rights under the First Amendment. This claim does not require Benson to show that he had a right to reimbursement under the Act, for even where there is no right to a valuable government benefit, the denial of that benefit may not be premised on an employee's exercise of his First Amendment rights. (citations omitted). 734 F.2d at 1185.

The only relevant c nsideration on Benson's First Amendment claim is whether it was objectively reasonable for the Defendants to retaliate against Benson for his exercise of First Amendment rights. On this basis, the district court rejected petitioners' qualified immunity defense on 3 separate occasions.

It was not objectively reasonable in 1976 to retaliate against an employee for exercising his or her First Amendment rights. *Pickering, supra*; *Hostrop v. Board of Junior College, District No. 515*, 471 F.2d 488, 491-93 (7th Cir.), *cert. denied*, 411 U.S. 967 (1973).

The decision of the Seventh Circuit is in full accord with the principles expressed in decisions of this Court and those decisions of the Courts of Appeals which have had occasion to address this subject matter.

There is another basic and fatal flaw in the petitioners' argument. It proceeds upon the erroneous assumption that Benson was revealing confidential information which came within the purview of the State confidentiality statute. Ill.Rev.Stat., ch. 120, §453.10(b). There is simply no support in the record for that assumption.

Benson was in fact exposing instances of official misconduct and illegal activity by Allphin, Rummel and others in the DOR. The public disclosure of such information is not precluded by the State of Illinois nor by the DOR. Benson disclosed the selective enforcement of the State's cigarette tax laws against private citizens, but not against public servants, especially Chicago police officers.

Benson's disclosures also included instances where motor fuel oil and retailer occupation tax cases had been compromised for inordinately low amounts and where bribery of DOR officials had been implicated in the settlements.

Allphin and Rummel had ultimate authority over such settlements.

Following his termination, Benson submitted an affidavit to a Judge of the Circuit Court of Cook County detailing in addition the selective enforcement issue, the facts concerning the alteration and destruction of DOR records to prevent that Judge from reviewing them during contempt proceedings which had involved Allphin. Rummel was also implicated in that obstruction of justice as set forth in Benson's affidavit.

Allphin and Rummel conspired to harass and silence Benson, to discredit him and destroy his credibility. Among their actions were attempts to have the INTERNAL REVENUE SERVICE and SOCIAL SECURITY ADMINISTRATION institute investigations of Benson (A.6). They also ordered the withdrawal of legal representation from Benson (A.5-6). They were successful in each of those efforts.

The State of Illinois has a statutory policy which rendered the conduct of Allphin and Rummel a class 4 (class 3 after October 1, 1977) felony. Upon conviction a public officer or employee would forfeit his office or employment. Ill.Rev.Stat., ch. 38, § 33-3. In addition, the failure to report a bribe is itself a Class A misdemeanor. *Id.*, § 33-2.

The Illinois Constitution also provides that the Governor may remove for incompetence, neglect of duty, or malfeasance in office any officer who may be appointed by the Governor. Ill. Const. (1970), Article V, § 10. Thus if Benson's revelations concerning Allphin came to the Governor's attention, Allphin and his right hand man Rummel would have both been out of jobs.

It is obvious from these circumstances that the cases relied upon by petitioners have no application whatsoever to this case. *Snepp v. United States*, 444 U.S. 507 (1980) concerned a former employee of the CENTRAL INTELLIGENCE AGENCY (CIA) who had agreed not to divulge CLASSIFIED information without authorization and not to publish any information relating to the CIA without prepublication clearance. This Court held that Snepp had violated a fiduciary obligation to the CIA when he published a book about CIA activities without prepublication review. *Snepp* is of no help to the petitioners in this case.

United States v. Marchetti, 466 F.2d 1309 (C.A. 4, 1972) also does not support petitioners' argument and in fact supports the Seventh Circuit. *Marchetti*, also concerned a former employee of the CIA and his attempts to publish information concerning the Agency. The Fourth Circuit found that the CIA secrecy agreement with Marchetti was constitutional and was not an illegal restraint in violation of the First Amendment. *Id.*, at 466 F.2d 1311.

However, the court did agree with Marchetti that the First Amendment precludes prior restraints with respect to information which is unclassified or officially disclosed. 466 F.2d 1313. The court there was concerned with SECRET information touching upon the national defense and the conduct of foreign affairs. The court here was concerned with information which Allphin and Rummel undoubtedly wanted kept secret, but which was neither secret nor classified in any legal sense. It was not even confidential in a legal sense.

The petitioners were not interested in protecting the confidentiality of DOR investigations or the integrity of individual files. They were desperate to protect themselves from a second round of criminal contempt charges and from possible indictments for their acts of official

misconduct. They were also interested in protecting their own jobs. Qualified immunity is not available as a defense in such circumstances.

The *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983) opinion is another former CIA employee case concerning SECRET information. It is inapplicable to this case except to the extent it recognized that a government employee's speech interest is entitled to more weight when he is speaking on a matter of general concern. The equal enforcement of the State's revenue laws and the honest administration of the DOR is of paramount importance to the people of the State of Illinois. If that agency is being corruptly managed, the people have a right to know and a duty to clean out the corruption.

The Seventh Circuit did not misapply the *Pickering* balancing test in this case. Its decision is in conformity with applicable case law. The fact of the matter is that the petitioners' have raised a false issue that is not supported by the record in this appeal. The actions of Allphin and Rummel went far beyond the "outer perimeter" of their "line of duty." *Barr v. Mateo*, 360 U.S. 564 (1959). Thev were not and are not now entitled to qualified immunity for their transgressions. Government officials cannot ignore with impunity the limitations which controlling law place upon their powers; they should be immune for actions only within the plain limits of their duties. *Butz v. Economou*, 438 U.S. 478 (1978).

Allphin and Rummel were not acting within the limits of their duties. They were engaged in acts of official misconduct and in an attempt to cover-up that misconduct by attacking Benson. There is no issue of whether there is an absolute right to disclose confidential information. The only issue is whether two corrupt State officials can obtain qualified immunity to shelter themselves from liability for violating Benson's First Amendment rights.

The jury found Allphin liable on Benson's claims and awarded $353,000.00 (A.6). The trial court specifically found that the jury's liability verdicts were reasonable (A.6; C.2). Rummel would undoubtedly have been found guilty as well if the trial court had not erroneously granted a directed verdict in his favor (A.23-24). (See *Benson v. Allphin and Rummel*, No. 86-27).

The foregoing reasons should be compelling to suggest to this Court to deny certiorari. The law was clearly established in 1976 that corrupt State officials who were engaged in acts of official misconduct and obstruction of justice were not authorized to retaliate against a former employee who exposed their corrupt activities to public scrutiny. Such officials cannot be permitted to prevail on the First Amendment claims of the former employee on the basis of qualified immunity or on any other basis.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: August 11, 1986